Board of Inquiry Interim Decision under
the ONTARIO HUMAN RIGHTS CODE, 1981

IN THE MATTER OF the Human Rights Code, 1981, s.o. 1981, c. 53, as amended.

AND IN THE MATTER OF the complaint made by Mr. G. Michael Roosma of Burlington, Ontario, dated August 29, 1985, as amended October 31, 1986, alleging discrimination in employment on the basis of creed, and constructive discrimination by Ford Motor Company of Canada Ltd. and The National Automobile and Agricultural Implement Workers of Canada, CAW Canada, Local 707.

AND IN THE MATTER OF the complaint made by Robert Weller of Mississauga, Ontario dated September 5, 1985, as amended October 31, 1986, alleging discrimination in employment on the basis of creed, and constructive discrimination by Ford Motor Company of Canada Ltd. and The National Automobile and Agricultural Implement Workers of Canada, CAW Local 707.

Date of Hearing	June 5, 1992
Place:	Toronto, Ontario
Before:	Peter P. Mercer
Appearances by:	D. Lepofsky, T. Bell and E. Taylor for the Ontario Human Rights Commission
	L.A. MacLean, Q.C. for the Respondent CAW Local 707
	P. Schabas for the Respondent Ford Motor Company of Canada Ltd.

Counsel for the Ontario Human Rights Commission proposes to call, as part of the case in reply, Mr. Brian M. Crockatt, a partner in the firm of Lindquist Avey Macdonald Baskerville, Forensic and Investigative Accountants. The purpose of so doing is to enter a report prepared by Mr. Crockatt which, according to the report's introduction, was commissioned "to review the costs attributed by Ford to the absences of Messrs. Roosma and Weller (R & W) from the Friday afternoon shifts and to determine the appropriateness of those costs and the impact on Ford". The report is accompanied by Mr. Crockatt's curriculum vitae and one loose page setting out thirteen assumptions made by him in preparing it.

Counsel for both respondents, after being granted a day's adjournment to review the report each object to it being tendered on several grounds. The first objection has to do with the alleged impropriety of the Commission in not giving the respondents prior disclosure of a report that deals largely with evidence given some two years ago. The Crown's duty of timely disclosure to an accused charged with an indictable offence, discussed in the judgment of the Supreme Court of Canada in Stinchcombe v. The Queen (1991), 68 C.C.C. (3d) 1, was suggested by counsel for the company as being somewhat analogous to the broader duty of the Commission not to be merely adversarial in this proceeding. Counsel urges that the Commission's tendering of the report at this time should be characterized as abusive.

I do not accept this argument. Had the Commission been both able and inclined to provide earlier disclosure of the report, that would have been desirable. However, there is no duty in law on the Commission to disclose a report intended to be entered in reply prior to the closing of the respondents' cases. Nor is the analogy with the Crown's duty in Stinchcombe particularly apt; the Commission's role under the Ontario Human Rights Code is

indeed not to be merely adversarial but these proceedings are also clearly civil and not criminal.

The respondents also argue that the report which the Commission proposes to tender is not proper reply evidence because it appears to focus on issues largely raised by the Commission itself during cross-examination of a witness called by the company. It is true that much of the report appears to have this focus although there are also references to evidence that was tendered by the company in chief. It is also difficult in proceedings of this scope with thousands of pages of exhibits (to say nothing of transcripts) to draw lines clearly around issues and the particular party that raised them. I would, therefore, refer to my interim decision of October 18, 1988, reported at (1989) 10 C.H.R.R. D/5766 at paragraphs 41833 to 41837. It may be useful to set out the first two paragraphs in full:

> **41833** As I have indicated above, and in my interim decision of November 20, 1987, the burden is initially on the Commission to establish a prima facie case of constructive discrimination and then shifts, if the prima facie case is established, to the respondents, subject of course to any arguments that might be made regarding the existence of any legal duty to accommodate by the respondent union. / It follows, therefore, that the burden is not on the Commission to show that the respondents could reasonably have accommodated the complainants. In the normal course of events, the Commission would attempt to establish its prima facie case, the respondents would put in their defence and the Commission would call reply evidence to respond to that defence. In this case, however, Mr. Lepofsky finds himself in a dilemma.
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> **41834** The dilemma is easily stated. In attempting to establish its prima facie case, the Commission will call the complainants. If the Commission attempts to anticipate the respondents' possible defence to reasonable accommodation by examining the complainants in-chief on that issue, Mr. Lepofsky is concerned that he will be vulnerable to a charge of case-splitting and a possible order preventing him from recalling the complainants in reply. If, on the other hand, he does not examine them in-chief on the issue of accommodation, but the respondents exercise their right

> to cross-examine during the case-in-chief on that issue, he is afraid he is similarly vulnerable to being precluded from calling reply evidence in response. He therefore seeks a ruling in advance.

I there dealt with this issue of case splitting, alluded to here by counsel for the respondents, by concluding with a ruling that "[b]ecause the burden is on the respondents to prove accommodation short of undue hardship where a prima facie case has been made out, the Commission will be entitled to recall the complainants or adduce other evidence in reply except to the extent that the reply evidence would simply reiterate earlier testimony". At least on the surface, I do not find that the report is inappropriate to be entered as part of the Commission's case in reply.

A more difficult objection raised by counsel for the respondents has to do with the utility of a report based on such limited assumptions. This may or may not be a major concern but it is not one that can be readily answered at this stage. It will presumably be a matter for argument whether the report in question sheds valuable light on the question of undue financial costs.

Finally, counsel for the respondents object that the proposed witness, Mr. Crockatt, has by reviewing certain transcripts of this case in order to prepare his report, put himself in violation of my original ruling that all witnesses were to be excluded. The purpose of that order was to prevent the possible distortion or tailoring of factual evidence that can occur when witnesses to those facts have previously heard others testify to them. My ruling was not really intended to apply to experts and, in any event, I so ruled in response to a request by the Commission on June 7, 1989 (see transcript volume XX, pp. 42-60). Counsel for the Union further submits that a report of an alleged expert, to be acceptable, should properly be based on a

clearly delineated set of hypothetical facts. However, that would clearly be impractical in this case and such an objection in proceedings such as these is not founded in law.

Consequently, I decline to rule that the report should be declared inadmissible and the Commission will be entitled to begin its reply case by calling Mr. Crockatt as a witness.

Dated at the City of London in the County of Middlesex this 9th day of June, 1992.

Peter P. Mercer
Board of Inquiry